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CLEARINGHOUSE RULE 98-081

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

2. Form, Style and Placement in Administrative Code

a. The second sentence of the definition of “cross-section” in s. ATCP 48.01 (6m) contains substantive material which should be placed in the text of the rule and omitted from the definition. Note that this material is also contained in s. ATCP 48.20 (1) (b). The same comment applies to the second sentence of the definition of “grade profile” in s. ATCP 48.01 (13m). [Although the terms “cross-section” and “grade profile” are defined, the equally important, companion term “alignment” is not defined. Is this an intentional omission?]

b. The term “specifications” is used often in the rule but it is not always clear whether it refers to cross-sections, grade profiles and alignments only or also to district boundaries and other specifications. If there is a consistent meaning of this term, a definition of it would be appropriate. If there is not, its use should be reviewed for clarity and consistency.

c. Section ATCP 48.01 (13r) (intro.) should be rewritten as follows: ““Formally established” means established or reestablished by any of the following:”.

d. The second sentence of s. ATCP 48.02 (3) Note appears to be creating authority for drainage district boards relative to the treatment of in-kind services. If this is the case, it should be placed in the text of the rule. The same appears to be true of s. ATCP 48.06 (4) Note, although that Note is not affected by this rule-making order.

e. On page 19, line 24, the notation “(1)” should be omitted.

f. To be more precise, the cross-reference in s. ATPC 48.08 (3) (a) should be “s. ATPC 48.24 (5) (b).” Similarly, s. ATPC 48.20 (1) (a) 3. should refer to s. ATPC 48.24 (1).

g. Section ATPC 48.20 (4) (b) Note should cite the rule or statute under which a challenge may be made. If this provision is attempting to create a new challenge or appeal process, it should be done in a substantive provision of the rule.

h. Section ATPC 48.20 (6) (a) and (b) should be combined in a single subunit. The second sentence should state that the drainage board *shall* reconstruct that documentation. The last sentence (the material now in par. (b)) should state that, if a county drainage board is unable to reconstruct all of the missing drainage district specifications required under sub. (1), the county drainage board shall establish missing specifications according to s. ATPC 48.21.

i. Section ATPC 48.21 (2) (a) (intro.) should read as follows: “A county drainage board may designate a private drain as a district drain if the county drainage board does any of the following:”. As written, the provision is not a true statement. [See s. ATPC 48.20 (5).]

j. In s. ATPC 48.21 (2) (a), it appears that subd. 2. should begin with the phrase “Purchases or.”

k. There are multiple review processes in ch. ATPC 48, and the relationship among them is not always clear. In particular, s. ATPC 48.20 describes the process for establishing drainage district specifications and includes a review process for those specifications. Sections ATPC 48.34 to 48.38 address the development of construction plans and include a departmental review process as well. However, s. ATPC 48.21, which addresses changing drainage district specifications, applies the review process for construction projects rather than the review process for establishment of drainage district specifications. See s. ATPC 48.21 (3). Is there a reason for this apparent discrepancy?

l. To avoid duplication of language, s. ATPC 48.21 (1) (b), (2) (b), (3) (b), (4) (b) and (5) (b) could be collapsed into a single new subsection to address the filing of new drainage district specifications.

m. In s. ATPC 48.21 (4) (a), the introductory material should end with the phrase “unless all of the following apply:”. The first subdivision should read: “The district has obtained the written consent . . . or bought the newly included land.” The second subdivision should read: “The department has approved”

n. Section ATPC 48.32 (2) Note should include addresses of the agencies from which the referenced document can be obtained.

o. The second paragraph of s. ATPC 48.33 (2) (c) Note appears to be substantive and should be placed in the text of the rule. Also, since this Note is identical to the Note following par. (d), it may be appropriate to combine the two Notes at the end of the subsection.

p. Section ATPC 48.38 should begin with a general statement that the department may approve, conditionally approve or deny an application, or else with a statement of criteria by which the department will decide whether to approve an application. Also, are the reasons for

disapproval listed in sub. (4) the only reasons the department may use for denying an approval? If so, this needs to be more clearly stated.

q. The second sentence of s. ATCP 48.44 (2) (d) Note is substantive and should be placed in the text of the rule.

r. In s. ATCP 48.44 (2) (e) (intro.), the word “all” should be replaced by the word “any.”

s. In s. ATCP 48.45 (1) (d), the phrase “in its discretion” is unnecessary and should be deleted.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In the analysis, the first sentence of the first paragraph on page 6 should be written in the singular tense.

b. In s. ATCP 48.01 (6m), should references to drain be replaced by references to the defined term “district drain”?

c. In s. ATCP 48.01 (13), the word “and” should be inserted before the word “any.”

d. In s. ATCP 48.01 (21), there is a stray underscoring mark below the hyphen in the word “cross-section.” The same occurs in s. ATCP 48.14 (1) (e).

e. In s. ATCP 48.08 (1) (b), the commas at the beginning and end of the inserted material should be omitted.

f. In s. ATCP 48.20 (1) (b), the rule refers to the “design depth” of a ditch, which presumably may be different from the actual depth of a ditch. The rule does not use the word “design” to modify references to the width of the ditch or the side slope angle of the ditch, suggesting that this refers to the actual rather than design width and side slope angle of the ditch. Is this distinction intentional?

g. Section ATCP 48.20 (2) (a) requires the noticing of a meeting, but does not explicitly require that the meeting itself be held. The same is true of s. ATCP 48.22 (2m) (a) 1. Compare these provisions to s. ATCP 48.36 (2) (a). Also, with respect to all three of these rule provisions, would it not be more useful if the plans to be heard were made available in advance of the meeting, giving members of the public time to prepare informed testimony to present at that meeting?

h. The procedures outlined in s. ATCP 48.20 are unclear. Upon close reading, it appears that a county drainage board is required to first develop draft district specifications, then to receive public comments on the draft specifications, then to submit the specifications to the department for approval and then finally to adopt the specifications. The rule does not follow this order; in fact it starts with a requirement that each county drainage board adopt specifications, and it makes no explicit reference to draft specifications. This process should be clarified.

i. Section ATCP 48.21 (5) (a) 2. requires that a county drainage board resolve to the satisfaction of the objecting landowner every timely objection filed with the county drainage board by a landowner to a change to a formally established grade profile. In contrast, when establishing a grade profile or any other specification, s. ATCP 48.20 (3) (e) requires only that the county drainage board identify its position on every unresolved objection. Is there a reason for this substantial difference in the treatment of objections to the creation versus the modification of a grade profile?

j. Section ATCP 48.22 (2m) (a) 1., requires a county drainage board to provide notice of public meetings to “every known landowner in the drainage district.” This requirement is vague. In particular, what constitutes “every known landowner”? What efforts is a county drainage board required to undertake to “know” all of the current landowners in the drainage district? Could the word “known” be deleted?

k. In s. ATCP 48.24 (5) (b), the words “under par. (a)” should be replaced by a phrase such as “to engage in an activity identified in par. (a).”

l. Should s. ATCP 48.24 (5) authorize a county drainage board to order the removal of unauthorized obstructions in a district corridor?

m. The statutory sections referenced in s. ATCP 48.38 (2) Note appear unrelated to the material that precedes that Note. The Note should either be elaborated further or deleted.